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No.

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ALEXANDER L. STEVAS.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

In re Grand Jury Investigation No. 83-2-35 (Durant)

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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QUESTION PRESENTED

Is the indentity of a client protected by the attorney-client privilege where:

- (a) the client could not be constitutionally compelled to reveal the same information; and
- (b) disclosure would provide the "last link" in an otherwise existing chain of incriminating evidence which the government concedes will lead to the client's immediate arrest?

PARTIES TO PROCEEDING

RICHARD DURANT — *Petitioner*

UNITED STATES OF AMERICA — *Respondent*

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OPINIONS BELOW

The opinion of the Court of Appeals is as yet unreported and is reproduced at pp. 1a-15a, *infra*. No opinion was issued by the District Court; the Order Compelling Disclosure is reproduced at pp. 16a-17a, *infra*; the Order of Contempt is reproduced at pp. 18a-19a, *infra*.

JURISDICTION

The opinion of the Court of Appeals (pp. 1a-15a) was issued on December 7, 1983.¹ This Court has jurisdiction pursuant to 28 USC 1254(1).

RULE AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that: "No person . . . shall be compelled in any criminal case to be a witness against himself."

The Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall have the right . . . to have the Assistance of Counsel for his defense."

Federal Rule Evid. 501 provides, "Except as otherwise required by the Constitution of the United States . . . the privilege of a witness [or] person shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

¹ On January 12, 1984 the 6th Circuit Court of Appeals granted a 30-day stay of that Court's Mandate to permit the filing of this Petition. A request to extend that stay was filed by Petitioner on February 14, 1984.

STATEMENT OF THE CASE²

Attorney Richard Durant (Durant), Petitioner herein, seeks review of a finding of contempt for failure to disclose the identity of a client to a grand jury upon order of court.

On March 1, 1983 Special Agent Edwards (Edwards) of the Federal Bureau of Investigation (FBI) visited Durant's office and explained that the FBI was investigating the theft of numerous checks made payable to International Business Machines, Inc. (IBM). Edwards said that a number of the stolen checks had been traced and deposited into various bank accounts under names of non-existent organizations, at least one of which included the initials "IBM." He produced a copy of a certified \$15,000.00 check, drawn upon one of these fictitious accounts, made payable to Durant's law firm.

Durant informed the FBI that this check had been received, endorsed and banked by his firm for services rendered to a client in two cases, one of which was "finished" and the other of which was "open." He refused to disclose the identity of the client to whose credit the proceeds had been applied, saying that giving this information might³ tend to incriminate the client and asserting the attorney-client privilege.

² This Statement of the Case is taken largely from the statement of facts in the opinion below.

³ The next day, March 2, 1983, the "might" apparently turned into certainty, for the FBI agents announced they would arrest the client as soon as they learned the client's identity. See page 5, *infra*.

Durant was subpoenaed to appear before the Grand Jury the following day, March 2, 1983, where he again refused to identify his client, giving the same grounds. The government immediately moved the United States District Court for the Eastern District of Michigan for an Order requiring Durant to provide the requested information. At a hearing that same afternoon Durant informed the Court that disclosure of his client's identity could incriminate that client in criminal activity under investigation so as to justify invoking the attorney-client privilege.

Durant pointed out that the requested information could be obtained through other methods which would not violate the attorney-client privilege:

"I should add that if the facts as the agents have discussed them with me are correct and there is a substantial number of checks floating around the city, all those checks come back to the drawee bank with bank endorsements on the back. It should be, it seems to me, equally possible, without violating the attorney-client privilege, for the agents to find out who presented, who cashed and to trace their money through normal commercial channels, to say nothing of the fact that who opens the mail at IBM now obviously becomes of significant importance."

The Court — The Honorable Julian Abele Cook, Jr., District Judge — ruled that the information sought by the Grand Jury was not protected by the attorney-client privilege and ordered Durant to identify his client (pp. 16a-17a, *infra*). Upon refusal to comply with this order, Durant was held in contempt (pp. 18a-19a, *infra*). Further proceedings were stayed until March 16, 1983, and subsequently stayed until March 22, 1983, to allow Durant to seek appellate review.

In an obvious attempt⁴ to ascertain the identity of Durant's client in an alternative manner, the United States issued a second subpoena to Durant on March 9, 1983, ordering him to appear before the grand jury on March 16, 1983 and produce the following documents:

"A listing of all clients of the law firm of Durant & Durant, P.C., and Richard Durant as of February 18, 1983 including all clients with active cases and clients who owe fees or have provided a retainer to the firm and all client ledger cards and other books, records and documents reflecting or recording payments to the law firm for the period February 1, 1983 to March 1, 1983."

Durant moved to quash this subpoena *duces tecum*. At the March 22, 1983 hearing on this motion, Durant again raised the attorney-client privilege and again asserted that production of the subpoenaed documents could implicate his client in criminal activity. He also said that the FBI had admitted before the the District Court Judge and himself in chambers that the FBI would arrest the client immediately following disclosure of the client's identity.

"I would remind the Court that when, through the courtesy of the Court, we had a session in chambers with the members of the FBI present, as well as the United States attorney and myself, the FBI members specifically said — I can't remember which one — specifically said that as soon as we get the name of that client, we are going to arrest the client. . . ."

This statement was never challenged, directly or indirectly, by either the District Court or the United States.

In effect, the identity of the client was the last link of evidence necessary to effect an indictment.

⁴ This phrase is the choice of the Court of Appeals. See p 3a.

The Court was advised for the first time by Durant that during the March 2, 1983 hearing the FBI had asked Durant, under threat of harassment, to breach the attorney-client privilege and identify his client without informing the client.

"Furthermore — and I put this on the record after consultation with my son, who told me I should have expressed it on March 2nd. During the time the Court recessed, preparatory to rendering an opinion, this gentleman — the FBI agent whose name escapes me for the moment — and I, the United States attorney were outside, and I was given the proposition that I should tell the FBI the identity of my client but not tell my client that I had done so, so that the FBI presumably could move in.

"When I rejected what was propositioned to me, that I should give the identity but delay telling my client that I had done so, so presumably the same result could occur — when I rejected that, I hope in jest, it was pointed out that I could be printed and held incommunicado for six or seven hours while the circuit was written [ridden (sic)] with me, and I implied it was a good thing that I had instructed my office that if they hadn't heard from me by 3:30, to come over here with a writ of habeas corpus. I made a phone call."

This statement was never challenged, directly or indirectly, by the government.

In effect, the identity of the client was important enough to the FBI to warrant threats against the attorney so that he would break the attorney-client confidentiality in an unethical manner.

The Court was informed that disclosure of the requested information would not only implicate Petitioner's client in criminal activity, but it would implicate that client in the very criminal activity for which the legal advice had been sought.

"COURT: Do you contend and do you submit that the disclosure of the information which is sought by this subpoena, quote, would implicate your client in the very criminal activity for which legal advice was sought?"

"MR. DURANT: Yes, your Honor, I do.

"COURT: Other than — in what way do you contend that it would?"

"MR. DURANT: Sir, I'm in a catch-22 position again. I can't tell you. If I tell you, I have explained things that my client obviously doesn't wish to be disclosed.

"COURT: All right."

The District Court, saying that the issues involved in the first and second subpoenas served upon Durant were "potentially the same," withheld a decision on Durant's Motion to Quash the Subpoena *Duces Tecum* pending appellate decision.

The Court of Appeals on December 7, 1983 affirmed the District Court's finding of contempt.

It unanimously held that Durant had failed to establish any exception to the general rule that disclosure of the identity of a client is outside the protection of the attorney-client privilege. It specifically rejected (p 13a, *infra*) the exception of the "last link in an existing chain of incriminating evidence likely to lead to the client's indictment" adopted by the 5th and 11th Circuits (*In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026 (CA 5, 1982) (*en banc*); *In re Grand Jury Proceedings (Twist)*, 689 F.2d 1351 (CA 11, 1982).

Two days previously the lower court had denied an appeal involving essentially the same issue in *In re Grand Jury Proceedings — Larry Gordon*, No. 83-3243, (CA 6, decided December 5, 1983). That decision is reproduced, *infra*, pp. 20a-31a. The earlier *Gordon* case — for which a Petition for a

Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit is currently pending in this Court — cited this *Durant* case as precedent.

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari should be granted for 2 reasons.

First, to resolve a conflict existing between the Circuits.

Second, to resolve a question of major significance to the legal profession and to the administration of justice.

The Decision Below Conflicts With The Decisions Of Other Circuits

The attorney-client privilege is historic. Its purpose

“is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” (*Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

The purpose is destroyed if clients are reluctant to consult with and confide in attorneys. To overcome that reluctance the privilege was established prior to the reign of Elizabeth I⁵

⁵ It began as a “point of honor” for the attorney; it had evolved by the 18th Century into the public policy we recognize today, when the privilege is the client’s in order to have full consultation with legal counsel.

and confirmed in *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1129, 1225 (Ex.1743), as quoted in 8 Wigmore, *Evidence*, Sec. 2291, at 546 (McNaughton rev., 1961):

“The reason why attorneys are not to be examined to *anything relating to their clients or their affairs* is because they would destroy the confidence that is necessary to be preserved between them. This confidence between the employer and the person employed, is so sacred a thing, that if they were at liberty, when the present cause was over that they were employed in, to give testimony in favour of any other person, it would not answer the end for which it was instituted. The end is, that persons with safety may substitute others in their room; and therefore if you cannot ask me, you cannot ask that man; for everything said to him, is as if I had said it to myself, and he is not to answer it.” (Emphasis added.)

Federal courts are unanimously of the opinion that the identity of a client is, with limited exceptions, not protected by the attorney-client privilege.

There are three of these limited exceptions, all based upon *Baird v. Koerner*, 279 F.2d 623 (CA 9, 1960).

The first of these is known as the “legal advice” exception.

“A significant exception to this principle of non-confidentiality holds that such information may be privileged when the person invoking the privilege is able to show that a strong possibility exists that disclosure of the information [the identity] would implicate the client in the very matter for which legal advice was sought in the first place.” (*In re Grand Jury Subpoenas Duces Tecum (Marger — Merenbach)*, 695 F.2d 363, 365 (CA 9, 1982).

The second of these is known as the "tantamount to a communication" exception.

"To the general rule is an exception, firmly bedded as the rule itself. The privilege may be recognized where so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication." (*NLRB v. Harvey*, 349 F.2d 900, 905 (CA 4, 1965))

The third of these is known as the "last link" exception.

"We have long recognized the general rule that matters involving the payment of fees and the identity of clients are not generally privileged. *In re Grand Jury Proceedings*, (*United States v. Jones*), 517 F.2d 666 (5th Cir. 1975); see cases collected *id.* at 670 n.2. There we also recognized, however, a limited and narrow exception to the general rule, one that obtains when the disclosure of the client's identity by his attorney would have supplied the last link in an existing chain of incriminating evidence likely to lead to the client's indictment." (*In re Grand Jury Proceedings (Pavlick)*, *supra*, at 1027.)

The Sixth Circuit, in its decision here, is willing to agree with the "legal advice" exception (p 10a, *infra*) and with the "tantamount to a communication" exception (p 12a, *infra*) but rejects the "last link" exception because

"[a]lthough the last link exception may promote concepts of fundamental fairness against self-incrimination, these concepts are not proper considerations to invoke the attorney-client privilege. Rather, the focus of the inquiry is whether disclosure of the identity would adversely implicate the confidentiality of communications. Accordingly, this Court rejects the last link exception as articulated in *Pavlick*." (*Durant*, p 13a, *infra*.)

There is thus created conflict and confusion between the Circuits. It is made the more serious because it involves a client's Fifth and Sixth Amendment rights.

The Court of Appeals holds that implicating the client in criminal activity by disclosing his identity "has no roots in confidentiality or communication [and therefore] cannot be advanced" as a justification for invoking the attorney-client privilege.

But, given the circumstances of this case, what greater concept of confidentiality or communication can there be than the identity of the client?

The right to assistance of counsel in one's defense includes the right to confer with one's lawyer (*Geders v. United States*, 425 U.S. 80 (1976)), and thus to disclose one's identity.

What becomes of the Sixth Amendment right to counsel if a potential defendant is afraid to confer with counsel lest, if his identity is disclosed by such counsel, he will be arrested?

The use made here of the identity "rule" by the Sixth Circuit turns it into a tool to undermine the attorney-client privilege and one's rights under both the Fifth and Sixth Amendments. It creates a powerful deterrent to any client from making full disclosure, including his identity, to his attorney in order to seek legal advice.

Durant was not simply asked the "identity" of the client — he was asked to give the name of the person who was involved with a certified check drawn on an account containing stolen funds. The FBI specifically said that once it had the name of the client, the client would be arrested.

The attorney was being compelled *explicitly* to put his client in jail.

This case demonstrates serious misuse of the grand jury subpoena (cf. *United States v. Calandra*, 414 U.S. 346 (1974)).

The sanctity and trust of the attorney-client relationship is corrupted to obtain information which cannot be constitutionally compelled directly from the client. Could the grand jury insist that the client say, "I am the person involved with this check drawn on a phoney bank account?" And, which this concededly provide the "last link" of evidence necessary for indictment and arrest.

The attorney's refusal to answer should be privileged unless it is "'perfectly clear, from a careful consideration of all the circumstances in the case, that . . . the answer *cannot possibly* have such tendency' to incriminate" his client. (*Hoffman v. United States*, 341 U.S. 479, 488 (1951), quoting *Temple v. Commonwealth*, 75 Va. 892, 898 (1880) (emphasis added in *Hoffman*).

Only this standard is consistent with the holding in *Fisher v. United States*, 425 U.S. 391 (1976), that the attorney-client privilege shields compelled disclosure *by the attorney* of information which, under the Fifth Amendment, may not be coerced *from the client*.

The Court of Appeals maintained that "identity" is not a "communication." Yet on the same page it ran a footnote pointing out the identity "was tantamount to a communication or admission from the clients to the attorney that 'they had not paid a sufficient amount in income taxes some one or more years in the past.'" (p 13a, *infra*)

Here the identity is "tantamount to a communication or admission from the client to the attorney that the client" is involved in stolen funds and checks drawn on fraudulent bank accounts.

Certainly the FBI regarded it as tantamount to "a communication or admission." The arrest warrant was apparently waiting, in blank, to be served.

To maintain the sanctity of the attorney-client relationship, both attorney and client must be able to predict with a fair

degree of certainty whether particular discussions will be protected (*Upjohn, supra*, at 393).

The lower court's decision creates uncertainty and ambiguity among the Circuits. It invites increased litigation challenging the validity of similar orders compelling testimony from attorneys where the attorney-client privilege is claimed.

This is especially true considering the rules of professional conduct requiring attorneys to preserve the confidentiality of their communications with a client. By rejecting the "last link" exception, the Sixth Circuit never addressed the question of whether or not the attorney can be compelled to reveal information which cannot be sought from the client.

The result of the lower court's decision will be delay while attorneys litigate to see if they are legally and/or ethically permitted to answer any grand jury questions involving the identity of a client.

An attorney-client privilege, if it is effectively to serve the policies for which it is intended, must be applied in a uniform and predictable fashion. If it is not, neither counsel nor client can rely upon its protection; it will not encourage the communication it was designed to promote.

**The Question Is Of Major Significance
To The Legal Profession
And To The Administration Of Justice**

Currently before this Court is a similar Petition for a Writ of Certiorari to the United States Courts of Appeal for the Sixth Circuit in *In re Grand Jury Proceeding (Larry Gordon)*. Petitioner herein joins and adopts by reference the reasoning and citations stated in Reason III of Petitioner Gordon's Reasons for Granting the Writ, with two additional arguments of his own.

Point #1 concerns the legal profession.

The history of the privilege here at issue dates, as far as we know, to the date of the compulsory attendance of witnesses. Prior to that time there would hardly have been much need for the struggle on admissibility of an attorney's testimony.

In England the struggle for the privilege did not end until the latter part of the 19th Century; in the United States there seems never to have been much doubt about it. This appears to have been because in our country the barrister and solicitor are one individual — there was therefore no "brief" presented to the barrister by the client and/or the solicitor — and there was therefore not nearly as much of the "inside story" to discover by way of interrogatories or cross examination.

It would be literally true that an opponent in possession of the "brief" would know your case, strengths and weaknesses, willy-nilly. There was thus a real disinclination to consult counsel as long as the facts could be discovered.

Although an attorney is an officer of the court, and hence bound not to deceive the court or counsel, nor to participate in criminal actions, historically an attorney's primary duty has been to his client. This has held true from the beginning, when lawyers were clerics and the law was administered and conducted by churchmen. As such the attorney has always been bound zealously to represent that client — some of them losing their heads for it.

Because it is the glory of our profession that a client's confidences are our secrets, we are bound, as lawyers, to protect them as vigorously as we can.

For this reason the Writ of Certiorari should here be granted so that the profession will know clearly, without ambiguity or confusion, what the rules are. In this sense it can be said that almost nothing is more important to the legal profession.

Point #2 relates to the administration of justice.

Justice is the even-handed administration of the law. The law in this case, as the lower court's opinion says, is that if a "strong possibility" exists that disclosure of the identity will implicate the client in the very matter for which legal advice was sought, disclosure is protected by the privilege.

The Court of Appeals maintained that it was "incumbent upon" Durant to make this showing by an *in camera ex parte* hearing.

But this completely ignores the finding by the same court (p 3a, *infra*) that disclosure of the identity meant arrest of the client for this very matter. It ignores the threats by the FBI to the attorney so that he would breach the client's confidence (p 4a, *infra*).

Moreover, it is a truism that a client seeking advice on criminal matters rarely, if ever, tells the truth, the whole truth and nothing but the truth to his attorney the first time around.

Far from "significantly diminish[ing] the credibility of Durant's subsequent March 22 representation" (p 15a, *infra*), the fact that on March 2 Durant knew nothing about the theft of IBM checks, while later on he was able to say that disclosure would implicate the client in the very matter for which advice was sought, serves to *emphasize* the credibility because it indicates, among other things, that three weeks had brought previously unfocused facts into focus.

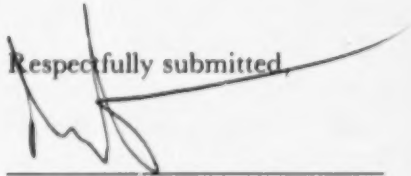
Thus justice has not been done here; the law has not been administered even-handedly; while admitting that the "strong possibility" — a certainty, in fact — had been established, in the same breath the court below denied that the burden had been met.

In sum, resolution of the question here presented will aid the legal profession and will assist the administration of justice in our courts.

CONCLUSION

For the above stated reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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APPENDICES

APPENDIX A

No. 83-1290

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

In re Grand Jury Investigation No. 83-2-35,
ON APPEAL from the United States District Court
for the Eastern District of Michigan.

Decided and Filed December 7, 1983

Before: ENGEL and KRUPANSKY, Circuit Judges, and
CELEBREZZE, Senior Circuit Judge.

KRUPANSKY, Circuit Judge. Attorney Richard Durant (Durant) appeals a finding of contempt for failure to disclose to the grand jury upon order of court the identity of his client. On March 1, 1983, Special Agent Edwards (Edwards), of the Federal Bureau of Investigation (FBI), visited Durant's office and explained that the FBI was investigating the theft of numerous checks made payable to International Business Machines, Inc. (IBM). He advised that a number of the stolen checks had been traced and deposited into various banking accounts under names of non-existent organizations, at least one of which included the initials "IBM". Edwards produced a photostatic copy of a check drawn upon one of these fictitious accounts which check was made payable to Durant's law firm. Upon FBI inquiry, Durant conceded that this check for \$15,000 had been received and endorsed by his firm for services rendered to a client in two cases, one of which was

"finished" and the other of which was "open". Durant refused to disclose the identity of his client to whose credit the proceeds had been applied, asserting the attorney-client privilege.

Durant was subpoenaed to appear before the grand jury the following day, March 2, 1983, where he again refused to identify his client, asserting the attorney-client privilege. The government immediately moved the United States District Court for the Eastern District of Michigan for an Order requiring Durant to provide the requested information. At a hearing that same afternoon, Durant informed the court that disclosure of his client's identity could incriminate that client in criminal activity so as to justify invoking the attorney-client privilege. Citing to the court: *In re Grand Jury Appearance (Michaelson)*, 511 F.2d 882 (9th Cir.), cert. denied, 421 U.S. 978, 95 S.Ct. 1979, 44 L.Ed.2d 469 (1975); *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960). Durant additionally stated that "I do not know any of the facts about this theft or anything else", and suggested that the requested information should be obtained through other methods.¹ The court adjudged that the privilege did not attach and ordered Durant to identify his client. Upon refusal to comply with this Order, Durant was held in contempt. Further proceedings (e.g. bond) were stayed until March 16, 1983, and subsequently stayed until March 22, 1983.

¹ Durant stated:

I should add that if the facts as the agents have discussed them with me are correct and there is a substantial number of checks flowing around the city, all those checks come back to the drawee bank with bank endorsements on the back. It should be, it seems to me, equally possible, without violating the attorney-client privilege, for the agents to find out who presented, who cashed and to trace the money through normal commercial channels, to say nothing of the fact that who opens the mail at IBM now obviously becomes of significant importance.

In an obvious attempt to ascertain the identity of Durant's client in an alternate manner, the United States issued a second subpoena to Durant on March 9, 1983, ordering him to appear before the grand jury on March 16, 1983, and produce the following documents:

A listing of all clients of the law firm of Durant & Durant, P.C. and Richard Durant as of February 18, 1983 including all clients with active cases and clients who owe fees or have provided a retainer to the firm and all client ledger cards and other books, records and documents reflecting or recording payments to the law firm for the period February 1, 1983 to March 1, 1983.

Durant moved to quash this subpoena duces tecum, again asserting the attorney-client privilege. At the March 22, 1983 hearing on this motion, Durant re-asserted that production of the subpoenaed documents could implicate his client in criminal activity. He additionally observed that the FBI had admitted before Durant and the district court judge in-chambers that an arrest would be effected by the FBI immediately following disclosure.² In effect, the identity of Durant's client was the last link of evidence necessary to effect an indictment. The Court was advised for the first time by Durant that on

² Durant stated:

I would remind the Court that when, through the courtesy of the Court, we had a session in-chambers with the members of the FBI present, as well as the U.S. Attorney and myself, the FBI members specifically said — I can't remember which one — specifically said that as soon as we get the name of that client, we are going to arrest the client * * *

The substance of this statement was never challenged either directly or indirectly by either the district court or the United States.

March 2, 1983 the FBI requested, under threat of harassment, that Durant "breach" the attorney-client privilege and identify his client without informing the client.³

The Court was informed that disclosure of the requested information would not only implicate Durant's client in criminal activity, but it would implicate that client in the very criminal activity for which legal advice had been sought.

COURT: Do you contend and do you submit that the disclosure of the information which is sought by this subpoena, quote, would implicate your client in the very criminal activity for which legal advice was sought?

MR. DURANT: Yes, Your Honor, I do.

COURT: Other than—in what way do you contend that it would?

MR. DURANT: Sir, I'm in a catch-22 position again. I can't tell you. If I tell you, I have explained things that my client obviously doesn't wish to be disclosed.

COURT: All right.

³ Durant stated:

Furthermore — and I put this on the record after consultation with my son, who told me I should have expressed it on March 2nd. During the time the Court recessed, preparatory to rendering an opinion, this gentlemen — the FBI agent whose name escapes me for the moment — and I, the U.S. Attorney were outside, and I was given the proposition that I should tell the FBI the identity of my client, but not tell my client that I had done so, so that the FBI presumably could move in.

When I rejected what was propositioned to me that I should give the identity but delay telling my client that I had done so, so presumably the same result could occur — when I rejected that, I hope in jest, it was pointed out that I could be printed and held incommunicado for six or seven hours while the circuit was written [riden[sic]] with me, and I implied it was a good thing that I had instructed my office that if they hadn't heard from me by 3:30, to come over here with a writ of habeas corpus. I made a phone call.

Durant failed to move the court for an *ex parte in camera* submission of evidence or testimony to establish that his client had indeed sought legal advice relating to past criminal activity involving theft of IBM checks. Nor did the district court, *sua sponte*, suggest an *ex parte in camera* submission of evidence to probe Durant's blanket statements.

The United States then introduced the check into evidence in support of the proposition that it was improbable that Durant's client had engaged Durant's services to defend against impending charges of theft. A notation on the lower left hand corner of the check stated "corporate legal services". The United States observed "That doesn't say anything about crimes committed or to be committed or legal services in connection with criminal matters. It is 'corporate legal services'; no suggestion of any criminal investigation." It was additionally noted by the government that the FBI had not initiated the investigation nor had it been informed of the theft of the IBM checks until March 1st, approximately two weeks *after* the check had been received by Durant. Durant offered the following rebuttal:

I don't know when IBM knew it (i.e. knew that checks had been stolen), but Mr. Edwards, when he appeared at my office, told me that it did involve checks from IBM, and I said that on March 2nd, when I appeared here.

I think the mere fact that the check says for "corporate legal services" when it has been admitted by the U.S. Attorney that such a corporation doesn't even exist, it is a fictional entity, doesn't deny what I am representing to the Court.

The district court, opining that the issues joined in the first and second subpoenas served upon Durant were "essentially the same", withheld a decision of Durant's motion to quash the second subpoena duces tecum pending appellate resolution of the court's contempt Order of March 2, 1983.

Confronting the applicability of the attorney-client privilege as urged by Durant, it is initially observed that the privilege is recognized in the federal forum. *See: Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1975); Rule 501, Federal Rules of Evidence. The burden of establishing the existence of the privilege rests with the person asserting it. *See: In re Walsh*, 623 F.2d 489, 493 (7th Cir.) *cert. denied*, 449 U.S. 994, 101 S.Ct. 531, 66 L.Ed.2d 291 (1980); *Liew v. Breen*, 640 F.2d 1046, 1049 (9th Cir. 1981); *United States v. Stern*, 511 F.2d 1364, 1367 (2nd Cir. 1975); *United States v. Landof*, 591 F.2d 36, 38 (9th Cir. 1979); *In re Grand Jury Empanelled February 14, 1978 (Markowitz)*, 603 F.2d 469, 474 (3d Cir. 1979); *United States v. Hodgson*, 492 F.2d 1175 (10th Cir. 1974); *United States v. Tratner*, 511 F.2d 248, 251 (7th Cir. 1975); *United States v. Demauro*, 581 F.2d 50, 55 (2d Cir. 1978); *United States v. Ponder*, 475 F.2d 37, 39 (5th Cir. 1973); *United States v. Bartlett*, 449 F.2d 700, 703 (8th Cir. 1971), *cert. denied*, 405 U.S. 932, 92 S.Ct. 990, 30 L.Ed.2d 808 (1972). The attorney-client privilege exists

to protect confidential communications between a lawyer and his client in matters that relate to the legal interests of society and the client.

In re Grand Jury Proceedings (Fine), 641 F.2d 199, 203 (5th Cir. 1981). *Accord: In re Grand Jury Subpoena (Slaughter)*, 694 F.2d 1258, 1260 (11th Cir. 1982); *United State v. Hodge and Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977); *In re Grand Jury Investigation (Tinari)*, 631 F.2d 17, 19 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083, 101 S.Ct. 869-70, 66 L.Ed.2d 808 (1981). The policy behind protecting confidential communications is self-evident:

In order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure from the legal advisors must be removed; hence the law must prohibit such disclosure except on the client's consent.

Hodge & Zweig, supra, 548 F.2d at 1353, citing 8 J. Wigmore, *Evidence*, §2291 at 545 (McNaughton Rev. Ed. 1961). *Accord Fisher, supra*, 425 U.S. at 403, 96 S. Ct. at 1577 ("The purpose of the privilege is to encourage clients to make full disclosure to their attorneys")⁴ See also: *United States v. Goldfarb*, 328 F.2d 280 (6th Cir.) cert. denied, 377 U.S. 976, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964).

Since the attorney-client privilege may serve as a mechanism to frustrate the investigative or fact-finding process, it creates an inherent tension with society's need for full and complete disclosure of all relevant evidence during implementation of the judicial process. See: *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666, 671-72, (5th Cir. 1975) ("the purpose of the privilege — to suppress truth — runs counter to the dominant aims of law"). In particular, invocation of the privilege before the grand jury may jeopardize an effective and comprehensive investigation into alleged violations of the law, and thereby thwart that body's dual functions of determining "if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *Branzburg v. Hayes*, 408 U.S. 665, 686-87, 92 S. Ct. 2646, 2659, 33 L.Ed. 2d 626 (1972).⁵ These competing

⁴ The Court additionally noted

As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully refined legal advice.

425 U.S. at 403, 96 S.Ct. at 1577.

⁵ It is fundamental, however, that although the subpoena powers of the grand jury are extremely broad, it may not use its authority to "violate a valid privilege, whether established by the Constitution, statutes, or the common law." *United States v. Calandra*, 414 U.S. 338, 346, 94 S.Ct. 613, 619, 38 L.Ed.2d 561 (1974).

societal interests demand that application of the privilege not exceed that which is necessary to effect the policy considerations underlying the privilege, i.e., "the privilege must be upheld only in those circumstances for which it was created." *In re Walsh, supra*, 623 F.2d at 492. *Accord: Fisher, supra*, 425 U.S. at 403, 96 S. Ct. at 1577 ("it applies only where necessary to achieve its purpose.") As a derogation of the search for truth, the privilege is to be narrowly construed. *See: United States v. Weger*, 709 F.2d 1151, 1154 (7th Cir. 1983); *Baird v. Koerner*, 279 F.2d 623, 631-32 (9th Cir. 1960); *United States v. Pipkins*, 528 F.2d 559, 562-63 (5th Cir. 1976).

The federal forum is unanimously in accord with the general rule that the identity of a client is, with limited exceptions, not within the protective ambit of the attorney-client privilege. *See: In re Grand Jury Proceedings (Pavlic)*, 680 F.2d 1026, 1027 (5th Cir. 1982) (en banc); *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666, 670-71 (5th Cir. 1975); *In re Grand Jury Proceedings (Fine)*, 641 F.2d 199, 204 (5th Cir. 1981); *Frank v. Tomlinson*, 351 F.2d 384 (5th Cir. 1965), *cert. denied*, 382 U.S. 1028, 86 S.Ct. 648, 15 L.Ed.2d 540 (1966); *In re Grand Jury Witness (Salas)*, 695 F.2d 359, 361 (9th Cir. 1982); *In re Grand Jury Subpoenas Duces Tecum (Marger/Merenbach)*, 695 F.2d 363, 365 (9th Cir. 1982); *In re Grand Jury Proceedings (Lawson)*, 600 F.2d 215, 218 (9th Cir. 1979).⁶

⁶ This general rule applies equally to fee arrangements:

In the absence of special circumstances, the amount of money paid or owed to an attorney by his client is generally not within the attorney-client privilege. *In re Michaelson*, 511 F.2d 882, 888 (9th Cir.) *cert. denied*, 421 U.S. 978, 95 S.Ct. 1979, 44 L.Ed.2d 469 (1975); *see In re Grand Jury Proceedings*, 517 F.2d 666, 670-71 (5th Cir. 1975). The receipt of fees from a client is not usually within the privilege because the payment of a fee is not normally a matter of confidence or a communication. *United States v. Hodgson*, 492 F.2d 1175 (10th Cir. 1974).

The Circuits have embraced various "exceptions" to the general rule that the identity of a client is not within the protective ambit of the attorney-client privilege. All such exceptions appear to be firmly grounded in the Ninth Circuit's seminal decision in *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960). In *Baird* the IRS received a letter from an attorney stating that an enclosed check in the amount of \$12,706 was being tendered for additional amounts due from undisclosed taxpayers. When the IRS summoned the attorney to ascertain the identity of the delinquent taxpayers the attorney refused identification asserting the attorney-client privilege. The Ninth Circuit, applying California law, adjudged that the "exception" to the general rule as pronounced in *Ex parte McDonough*, 170 Cal. 230, 149 P. 566 (1915) controlled:

The name of the client will be considered privileged matter where the circumstances of the case are such that the name of the client is material only for the purpose of showing an acknowledgement of guilt on the part of such client of the very offenses on account of which the attorney was employed.

Baird, *supra*, 279 F.2d at 633. The identity of the *Baird* taxpayer was adjudged within this exception to the general rule. The Ninth Circuit has continued to acknowledge this exception:

A significant exception to this principal of non-confidentiality holds that such information may be privileged when

(footnote 6 continued)

This Court has held that ministerial or clerical services of an attorney in transferring funds to or from a client is not a matter of confidence protected by the attorney-client privilege. *United States v. Bartone*, 400 F.2d 459 (6 Cir. 1968), *cert. denied*, 393 U.S. 1027, 89 S.Ct. 631, 21 L.Ed.2d 571 (1969).

United States v. Haddad, 527 F.2d 537, 538-39 (6th Cir. 1975).

the person invoking the privilege is able to show that a strong possibility exists that disclosure of the information would implicate the client in the very matter for which legal advice was sought in the first case.

In re Grand Jury Subpoenas Duces Tecum (Marger/Merenbach), 695 F.2d 363, 365 (9th Cir. 1982). *Accord: United States v. Hodge and Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977); *In re Grand Jury Proceedings (Lawson)*, 600 F.2d 215, 218 (9th Cir. 1979) *United States v. Sherman*, 627 F.2d 189, 190-91 (9th Cir. 1980); *In re Grand Jury Witness (Salas)*, 695 F.2d 359, 361 (9th Cir. 1982). This exception, which can perhaps be most succinctly characterized as the "legal advice" exception, has also been recognized by other circuits. *See: In re Walsh*, 623 F.2d 489, 495 (7th Cir.), *cert. denied*, 449 U.S. 994, 101 S.Ct. 531, 66 L.Ed.2d 291 (1980); *In re Grand Jury Investigation (Tinari)*, 631 F.2d 17, 19 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083, 101 S.Ct. 869-70, 66 L.Ed. 2d 808 (1981). Since the legal advice exception is firmly grounded in the policy of protecting confidential communications, this Court adopts and applies its principles herein. *See: In re Grand Jury Subpoenas Duces Tecum (Marger/Merenbach)*, *supra*.

It should be observed, however, that the legal advice exception may be defeated through a *prima facie* showing that the legal representation was secured in furtherance of present or intended continuing illegality, as where the legal representation itself is part of a larger conspiracy. *See: In re Grand Jury Subpoenas Duces Tecum (Marger/Merenbach)*, *supra*, 695 F.2d at 365 n.1; *In re Walsh*, 623 F.2d 489, 495 (7th Cir.), *cert. denied*, 449 U.S. 994 (1980); *In re Grand Jury Investigation (Tinari)*, 631 F.2d 17, 19 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981); *In re Grand Jury Proceedings (Lawson)*, 600 F.2d 215, 218 (9th Cir. 1979); *United States v. Friedman*, 445 F.2d 1076, 1086 (9th Cir. 1971). *See also: Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct.

469, 77 L.Ed. 993 (1933); *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026, 1028-29 (5th Cir. 1982) (en banc).

Another exception to the general rule that the identity of a client is not privileged arises where disclosure of the identity would be tantamount to disclosing an otherwise protected confidential communication. In *Baird*, *supra*, the Ninth Circuit observed:

If the identification of the client conveys information which ordinarily would be conceded to be part of the usual privileged communication between attorney and client, then the privilege should extend to such identification in the absence of other factors.

Id., 279 F.2d at 632. Citing *Baird*, the Fourth Circuit promulgated the following exception:

To the general rule is an exception, firmly bedded as the rule itself. The privilege may be recognized where so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication.

NLRB v. Harvey, 349 F.2d 900, 905 (4th Cir. 1965). *Accord*: *United States v. Tratner*, 511 F.2d 248, 252 (7th Cir. 1975); *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962), *cert. denied*, 371 U.S. 951, 83 S.Ct. 505, 9 L.Ed.2d 499 (1963); *Tillotson v. Boughner*, 350 F.2d 663, 666 (7th Cir. 1965); *United States v. Pape*, 144 F.2d 778, 783 (2d Cir. 1944). *See also*: *Chirac v. Reinecker*, 24 U.S. (11 Wheat) 280, 6 L.Ed. 474 (1826). The Seventh Circuit has added to the *Harvey* exception the following emphasized caveat:

The privilege may be recognized where so much of the actual communication has already been disclosed [*not necessarily by the attorney, but by independent sources as well*] that identification of the client [*or of fees paid*] amounts to disclosure of a confidential communication.

United States v. Jeffers, 535 F.2d 1101, 1115 (7th Cir. 1976) (emphasis added). The Third Circuit, applying this exception, has emphasized that it is the link between the client and the communication, rather than the link between the client and the possibility of potential criminal prosecution, which serves to bring the client's identity within the protective ambit of the attorney-client privilege. See: *In re Grand Jury Empanelled February 14, 1978 (Markowitz)*, 603 F.2d 469, 473 n.4 (3d Cir. 1979). Like the "legal advice" exception, this exception is also firmly rooted in principles of confidentiality.

Another exception, articulated in the Fifth Circuit's *en banc* decision of *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026 (5th Cir. 1982) (*en banc*),⁷ is recognized when disclosure of the identity of the client would provide the "last link" of evidence:

We have long recognized the general rule that matters involving the payment of fees and the identity of clients are not generally privileged. *In re Grand Jury Proceedings, (United States v. Jones)*, 517 F.2d 666 (5th Cir. 1975); see cases collected *id.* at 670 n.2. There we also recognized, however, a limited and narrow exception to the general rule, one that obtains when the disclosure of the client's identity by his attorney would have supplied the last link in an existing chain of incriminating evidence likely to lead to the client's indictment.

⁷ It appears that *Pavlick sub silentio* overruled *In re Grand Jury Proceedings (Fine)*, 641 F.2d 199 (5th Cir. 1981), wherein a panel of the Fifth Circuit applied the "legal advice" exception rather than a "last link" exception.

Id. at 1027.⁸ Upon careful consideration this Court concludes that, although language exists in *Baird* to support viability of *Pavlick's* "last link" exception,⁹ the exception is simply not grounded upon the preservation of confidential *communications* and hence not justifiable to support the attorney-client privilege. Although the last link exception may promote concepts of fundamental fairness against self-incrimination, these concepts are not proper considerations to invoke the attorney-client privilege. Rather, the focus of the inquiry is whether disclosure of the identity would adversely implicate the confidentiality of communications. Accordingly, this Court rejects the last link exception as articulated in *Pavlick*.

Turning to the facts at bar, it is observed that Durant asserted three justifications for invocation of the attorney-client privilege. First, at the March 2 hearing, he stated that disclosure might possibly implicate the client in criminal activity. As this justification has no roots in concepts of confidentiality or communication, it cannot be advanced to support an abdication of the general rule that identity of a client is

⁸ The Eleventh Circuit has adopted the "last link" exception as pronounced in *Pavlick*. See: *In re Grand Jury Proceedings (Twist)*, 689 F.2d 1351, 1352-3 (11th Cir. 1982); *In re Grand Jury Subpoena (Slaughter)*, 694 F.2d 1258, 1260 (11th Cir. 1982). See also: *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666 (5th Cir. 1975), adopted by the Eleventh Circuit as precedent in *Bonner v. City of Prichard*, 666 F.2d 1206 (11th Cir. 1981). Compare, however, *In re Grand Jury Proceedings, (Freeman)*, 708 F.2d 1571, 1573-74 (11th Cir. 1983), affirming a contempt order issued by a district court which applied the "legal advice" rather than "last link" exception.

⁹ Although *Baird* observed in passing that disclosure of the identity of the clients "may well be the link that could form the chain of testimony necessary to convict [the taxpayers] of a federal crime", 279 F.2d at 633, the Court repeatedly emphasized that the retention of the attorney and remission of a check to the IRS was tantamount to a *communication* or admission from the clients to the attorney that "they had not paid a sufficient amount in income taxes some one or more years in the past". *Id.*

not privileged. Second, at the March 22 hearing, Durant informed the Court that the FBI had informed him that an arrest would be effected upon disclosure of the identity of Durant's client. This is simply an assertion that disclosure would provide the last link of evidence to support an indictment as articulated in *Pavlick* — a precedent which is here rejected.

Third, at the March 22 hearing, Durant submitted that disclosure was justified under the "legal advice" exception embraced by the Ninth Circuit. Seeking to invoke this exception, it was incumbent upon Durant to "show that a *strong possibility* exist[ed] that disclosure of the information would implicate the client in the very matter for which legal advice [had been] sought in the first case". *In re Grand Jury Subpoenas Duces Tecum (Marger/Merenbach)*, *supra*, 695 F.2d at 365 (emphasis added). A well recognized means for an attorney to demonstrate the existence of an exception to the general rule, while simultaneously preserving confidentiality of the identity of his client, is to move the court for an *in camera ex parte* hearing. See: *In re Grand Jury Witness (Salas)*, *supra*, 695 F.2d at 362; (proper procedure to establish existence of "legal advice" exception was to make an *in camera* showing); *In re Grand Jury Empanelled February 14, 1978 (Markowitz)*, *supra*, 603 F.2d at 474 (referring to procedure to be employed by an attorney who asserts Fifth Amendment privilege); *In re Grand Jury Subpoena (Slaughter)*, *supra*, 694 F.2d at 1260 n.2 (United States requested in its subpoena that any averred privileged matters be deleted and the original copy retained intact for possible *in camera* inspection by the district court); *In re Walsh*, *supra*, 623 F.2d at 494 n. 5; *United States v. Tratner*, *supra*, 511 F.2d at 252.

Since the burden of establishing the existence of the privilege rests with the party asserting the privilege, it is incumbent upon the attorney to move for an *in camera ex parte* hearing if one is desired. In the action *sub judice*, Durant failed to so move. Rather, he rested on his blanket assertion that his

client had initially sought legal advice relating to matters involving the theft of IBM checks. Such unsupported assertions of privilege are strongly disfavored. *See: United States v. Cromer*, 483 F.2d 99, 102 (9th Cir. 1973); *United States v. Davis*, 636 F.2d 1028, 1044 n.20 (5th Cir. 1981); *In re Grand Jury Witness (Salas)*, *supra*, 695 F.2d at 362. Further, it is pertinent to observe that at the first hearing on March 2 Durant had expressly disavowed knowledge of the existence of stolen IBM checks. This statement significantly diminishes the credibility of Durant's subsequent March 22 representation that his client had indeed engaged Durant's services for past activity relating to stolen FBI checks. Accordingly, Durant clearly failed to satisfy his burden of demonstrating a "strong possibility" that disclosure of the identity of his client would implicate that client in the very manner for which legal advice had been initially sought.

Last, it is observed that Durant did not represent to the district court that disclosure of the identity of his client would amount to a disclosure of a confidential communication. *See: NLRB v. Harvey*, *supra*; *United States v. Jeffers*, *supra*. Not having advanced this exception to the general rule, it follows axiomatically that Durant failed to satisfy the burden of establishing its existence. Nor does the record suggest the viability of this exception so as to justify a remand.

In sum, Durant has failed to establish the existence of any exception to the general rule that disclosure of the identity of a client is not within the protective ambit of the attorney-client privilege. Therefore the contempt Order of the district court issued against Durant is hereby **AFFIRMED**.

APPENDIX B

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

IN RE: Grand Jury Investigation
Number 83-2-35

MISC. NO. 83-167

ORDER

At a session of said court, held in the United States District Court, Detroit, Michigan on March 2, 1983.

PRESENT: HONORABLE JULIAN A. COOK, JR.
United States District Judge

The government having petitioned the court to compel a grand jury witness, Richard Durant, to provide information to a grand jury concerning the identity of a client and,

The court having heard the arguments of counsel for the government and Richard Durant makes the following findings:

1. That Richard Durant was subpoenaed to testify before a grand jury and provide information concerning the identity of a client of the law firm of Durant and Durant, P.C.
2. That Richard Durant refused to provide said information to the grand jury asserting that the identity of the client is protected by the attorney-client privilege.
3. That the information concerning the identity of the client of Richard Durant is not protected by the attorney-client privilege.

ACCORDINGLY, IT IS HEREBY ORDERED that Richard Durant disclose the identity of the client as called for by the grand jury subpoena.

/s/ JULIAN ABELE COOK, JR.

HONORABLE
JULIAN A. COOK, JR.
United States District Judge

DATED: March 11, 1983

APPENDIX C

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

IN RE: Grand Jury Investigation
Number 83-2-35

MISC. NO. 83-167

ORDER

At a session of said court, held in the United States District Court, Detroit, Michigan on March 2, 1983.

PRESENT: HONORABLE JULIAN A. COOK, JR.
United States District Judge

The court having ordered and directed Richard Durant to disclose the identity of a client and,

Richard Durant having stated to the court that he will not comply with the court's order and will not disclose the client's identity;

IT IS HEREBY ORDERED that Richard Durant is adjudged in contempt of this court for his failure to comply to the court's order;

IT IS FURTHER ORDERED that upon Richard Durant's representation that he intends to pursue an appeal in the matter, further proceedings are stayed until March 16, 1983 at 2:00 P.M. at which time the parties are directed to return to this court.

/s/ JULIAN ABELE COOK, JR.

HONORABLE
JULIAN A. COOK, JR.
United States District Judge

DATED: March 11, 1983

APPENDIX D

No. 83-3243
**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

In Re: GRAND JURY PROCEEDINGS —
LARRY GORDON,

JOHN DOE,
Intervenor-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio.

Decided and Filed December 5, 1983

Before: EDWARDS, and KRUPANSKY, Circuit Judges; and
REED, District Judge*.

* Hon. Scott Reed, United States District Judge for the Eastern District of Kentucky, sitting by designation.

KRUPANSKY, Circuit Judge. The intervenor-appellant, John Doe (Doe), appeals from an order of the District Court for the Northern District of Ohio which requires Larry S. Gordon (Gordon) to answer certain questions posed by a federal grand jury.

The factual background to this controversy is straight-forward. For several years a grand jury sitting in the Northern District of Ohio has been conducting an investigation into possible violations of the Internal Revenue Code by Reuben Sturman (Sturman) and several alleged corporate facades under his control.

Despite continuous efforts, the grand jury has been frustrated in its attempts to secure documented information concerning the stock ownership and/or control of the corporations which are the subject of the grand jury investigation. On May 2, 1980, the grand jury issued a subpoena *ad testificandum* to Larry S. Gordon (Gordon), an attorney with the law firm of Berkman, Gordon, Kancelbaum & Levy. Gordon appeared on the scheduled date and testified. He identified 12 corporations incorporated by his law firm and also four others as clients of the firm. Gordon further testified that, at some period of time, the corporate record books and stock ledgers for these corporations were kept at his firm's offices. Finally, Gordon acknowledged that Sturman was a client of the firm who was represented by Gordon.

However, when confronted by certain inquiries designed to elicit information concerning the alleged *de jure* corporate status of the corporations here in issue, Gordon refused to answer, invoking the attorney-client privilege. Accordingly, on January 22, 1982, the government petitioned the district court to compel Gordon to:

1. identify the person or persons who requested each incorporation;

2. identify the person or persons who provided the law firm with information concerning the identity of the officers and shareholders of each corporation; and

3. identify the agent or representative the firm dealt with when legal matters arose concerning each of the named corporations;

4. identify the person or persons who requested and/or received custody of the records of each corporation from the law firm in January, 1978.

The government submitted an affidavit under seal in support of its motion.

Thereafter, Gordon requested that he be permitted to examine his grand jury testimony and the affidavit in support of the aforementioned motion that had been submitted by the government under seal. A motion to intervene was also filed by a "John Doe" asserting that he was the individual the government was attempting to identify through Gordon's interrogation.

On January 18, 1983 the lower court granted Gordon's request to examine his grand jury testimony but denied him access to the affidavit filed by the government in support of its motion to compel answers to the grand jury. The court deferred ruling on Doe's motion to intervene to enable Doe to demonstrate to the court that he was in fact Gordon's client and the target of the inquiries. On March 15, 1983, after reviewing, *in camera*, an affidavit from Doe, the lower court permitted him to intervene "on the basis of John Doe's claim of attorney-client privilege." Doe has also asserted a right to intervene based on the Fifth Amendment, but the lower court found the reliance "misplaced."

On March 29, 1983, the lower court granted the government's motion to compel Gordon to answer the four identity

questions directed to him concluding that the answers would not constitute an invasion of the attorney-client privilege.

The intervenor appealed from this order, execution of which has been stayed by the lower court.

Initially, this Court is confronted with a jurisdictional issue.¹ Generally, an order compelling testimony or denying a motion to quash a grand jury subpoena is not appealable. *United States v. Ryan*, 402 U.S. 530 (1971); *Cobbledick v. United States*, 309 U.S. 323 (1940). A party seeking to contest the validity of the trial court's order must refuse compliance, thereby inviting a contempt citation which, when imposed, becomes an appealable order.

The Supreme Court has recognized an exception to this rule when the party seeking review has a more direct interest in preventing disclosure of the information sought by the grand jury than the individual to whom the subpoena was directed. *Pertman v. United States*, 247 U.S. 7 (1918). The rationale for the exception recognizes that the subpoenaed party, to avoid a contempt citation, may voluntarily comply with the subpoena thereby depriving the real party in interest of a protected right and appellate review.

Presently there is a conflict within the Circuits as to the application of the *Pertman* exception, where, as here, a client seeks immediate review of an order compelling testimony or documents from his attorney. The majority view recognizes the exception and permits immediate appellate review. See *United States v. Jones*, 696 F.2d 1069 (4th Cir. 1981); *In re Grand Jury Subpoena Duces Tecum (Marger/Merenbach)*, 695 F.2d 363 (9th Cir. 1982); *In re Grand Jury Proceedings (Damore)*, 689 F.2d 1351 (11th Cir. 1982); *In re Grand Jury Proceedings (Fine)*, 641

¹ Although the government does not contest this Court's jurisdiction, the Court has the obligation to consider the issue, *sua sponte*. See e.g., *Columbus Coated Fabrics v. Industrial Commission of Ohio*, 498 F.2d 408 (6th Cir. 1974).

F.2d 199 (5th Cir. 1981); *In re Grand Jury Proceedings (Malone)*, 655 F.2d 882 (8th Cir. 1981); *In re Katz*, 623 F.2d 122 (2d Cir. 1980), *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798 (3d Cir. 1979); *Velsicol Chemical Corp. v. Parsons*, 561 F.2d 671 (7th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978). The D. C. and First Circuits have decided that the order is not immediately appealable. *In re Sealed Case*, 655 F.2d 1298 (D.C. Cir. 1981); *In re Oberkoetter*, 612 F.2d 15 (1st Cir. 1980).

In concluding that the order is not immediately appealable, the First Circuit stated that a "stout-hearted" attorney may risk a contempt citation in his client's interest. This premise is tenuous. As noted by the Fifth Circuit:

We suspect that the willingness of a lawyer to protect a client's privilege in the face of a contempt citation will vary greatly, and have a direct relationship to the value of the client's business and the power of the client in relation to the attorney. We are reluctant to pin the appealability of a district court order upon such precarious considerations.

* * *

Although we cannot say that attorneys in general are more or less likely to submit to a contempt citation rather than violate a client's confidence, we can say without reservation that some significant number of client-intervenors might find themselves denied all meaningful appeal by attorneys unwilling to make such a sacrifice. That serious consequence is enough to justify a holding that a client-intervenor may appeal an order compelling testimony from the client's attorney.

In re Grand Jury Proceedings (Fine), *supra*, at 202-03 (footnote omitted).²

² The American Bar Association's former Disciplinary Rules permitted a lawyer to disclose a client's confidences when "required by law or court order." DR 4-101 (e)(2). See generally *In re Grand Jury Proceedings (Fine)*, *supra* at 202-03. The recently adopted Model Rules of Professional Conduct do not expressly address the attorney's responsibility to maintain confidentiality in the face of a court order. Rule 1.6 provides as follows:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

On its face, the Rule does not afford the attorney the option of disclosing information when compelled by court order. However, the Comment accompanying Rule 1.6 states, in pertinent part:

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer *must* comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

(emphasis added). The Comment appears to indicate that an attorney cannot place himself in contempt but must disclose confidences when so ordered by a court.

In any event, this Court does not believe that appealability should hinge on an attorney's interpretation of the Disciplinary Rules, the Model Rules of Professional Conduct (whichever is applicable) or the attorney's "stout-heartedness."

This Court adopts the above-quoted logic and joins the majority of other Circuits in applying the *Perlman* exception in those cases wherein a client seeks immediate appeal of an order compelling testimony from his attorney. Accordingly, the Court's appellate jurisdiction is properly invoked in the matter at bar.³

Addressing the merits of the instant case, it is evident that the four interrogatories directed to Gordon merely seek the identity of his client. The Circuit has acknowledged the "unanimously embraced . . . general rule that the identity of a client is . . . not within the protective ambit of the attorney-client privilege." *In re Grand Jury Investigation No. 83-2-35*, No. 83-1290, slip op. at ____ (6th Cir. ____, 1983).

This Court, in *In re Grand Jury Investigation No. 83-2-35*, *supra*, has also recognized two exceptions to the general rule. The first exception, characterized as the "legal advice" exception, was defined by the Ninth Circuit in *In re Grand Jury Subpoena Duces Tecum (Marger/Merenbach)*, *supra* at 365:

A significant exception to this principle of non-confidentiality holds that [the identity] may be privileged when the person invoking the privilege is able to show that a strong possibility exists that disclosure of [his identity] would implicate

³ In *In re Buckley*, 395 F.2d 385 (6th Cir. 1968), an attorney refused to answer three questions directed to him before a grand jury, invoking the attorney-client privilege. The district court instructed the attorney to respond. The corporation for which the attorney was house counsel attempted to appeal from the lower court's order. This Court concluded that, inasmuch as the witness had not been cited for contempt, the order was not appealable.

The Court in *Buckley* did not consider the possible applicability of the *Perlman* exception. Moreover, in *In re Grand Jury Subpoena Dated Nov. 8, 1979*, 622 F.2d 933, 935, n.2 (6th Cir. 1980), this Court indicated that the exception does apply in a attorney-client relationship. This panel therefore does not consider *Buckley* dispositive on the issue.

the client in the very matter for which legal advice was sought in the first case.

In the case at bar, the district court concluded that the "legal advice" exception was inapplicable to this case. This Court concurs. The record, including the *in camera* affidavit of Doe, discloses that Doe sought legal assistance to incorporate several companies. There is no criminal implication arising from Doe having directed an attorney to incorporate a number of business enterprises. Accordingly, the legal advice exception is unavailing to Doe.

The second exception recognized in *In re Grand Jury Investigation No. 83-2-35*, is applicable "where disclosure of the identity would be tantamount to revealing an otherwise confidential communication." *In re Grand Jury Investigation No. 83-2-35, supra* at _____. As pronounced by the Fourth Circuit:

The privilege may be recognized where so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication.

NLRB v. Harvey, 349 F.2d 900, 905 (4th Cir. 1965).

In considering the applicability of the second exception, the Court addresses each of the four inquiries directed to Gordon. Inquiry #1 seeks the identity of the individual who engaged Gordon to incorporate each company. Gordon's previous disclosures simply reveal that a client employed his firm to incorporate the companies. Doe, in his *in camera* affidavit, conceded that he is the client who directed Gordon to incorporate the companies in issue. Accordingly, the identity of the client, within the context of the developed facts, merely amounts to a disclosure of the scope and objective of the legal employment undertaken by Gordon.

The mere "fact of consultation including the component facts of . . . scope or object of employment" is not privileged.

McCormick, Evidence § 90 (2d ed. 1972). See also 2 Weinstein's Evidence ¶ 503(a)(4)[02](1982); *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963) (general nature of legal services performed not privileged).⁴ Thus disclosure of Doe's identity in response to inquiry #1 would not be tantamount to disclosure of a confidential communication.

Inquiry #2 seeks to have Gordon disclose the name of the individual who conveyed to Gordon the identity of the officers and shareholders of the various corporations. The names of shareholders and officers "are clearly a matter of corporate record [and] are not normally the kind of confidential information which is subject to the attorney-client privilege." *United States v. Mackey*, *supra* at 859. Inasmuch as the substance of the communication was not confidential, revelation of the identity of the individual who supplied the names of the corporate officers to Gordon cannot amount to disclosure of a confidential communication. Therefore, question #2 does not seek privileged information and should be answered.

Inquiry #3 seeks the identity of the representatives of the corporations with whom the law firm communicated regarding "legal matters" involving the corporations. The inquiry does not seek, nor has there been any disclosure of, communications between Gordon and corporate representatives concerning substantive corporate legal issues. Accordingly, the second exception enunciated in *In re Grand Jury Investigation No. 83-2-35*, is totally inapplicable to inquiry #3 and Gordon has no basis for refusing to respond.

⁴ In *United States v. Mackey*, 405 F.Supp. 854 (E.D. N.Y. 1975), defendants sought dismissal of indictments on the basis that the testimony of their attorneys before the grand jury violated the attorney-client privilege. The testimony concerned incorporation of certain business entities. Judge Weinstein held that such facts "simply relating that certain corporate documents were drawn at the behest of [the client] are not privileged from disclosure before the grand jury." *Id.* at 859.

The fourth and final question does not relate to communications which in any manner concern legal advice or legal representation. The question merely attempts to determine the identity of the individual to whom the law firm delivered the corporate records. Indeed, as the lower court noted, Doe has not indicated that the fourth question refers to him. Accordingly, there is no basis for applying the attorney-client privilege to inquiry #4.

In sum, the Court concludes that response to the four inquiries posed by the grand jury will not infringe on the attorney-client privilege and the district court's order compelling Gordon to respond to these inquiries was proper.

Appellant next asserts that his attorney should have been permitted to assert the Fifth Amendment privilege against self-incrimination on behalf of his client. However, existing legal precedent in this Circuit holds that the Fifth Amendment privilege is a personal privilege and "does not permit an attorney to plead that his client might be incriminated by his testimony." *United States v. Haddad*, 527 F.2d 537, 539 (6th Cir. 1975). *Accord: United States v. Goldfarb*, 328 F.2d 280 (6th Cir. 1964).⁵

⁵ Doe's reliance on *Fisher v. United States*, 425 U.S. 341 (1976), is misplaced. In *Fisher*, the Supreme Court held that when a client's papers are delivered to an attorney in pursuit of legal advice, those papers are protected by the attorney-client privilege if the Fifth Amendment would have protected them in the hands of the client. This holding is based on the attorney-client privilege, *see, Matter of Grand Jury Empanelled February 14, 1978, supra* at 475, and this Court has previously found that privilege inapplicable to the facts of this case. The Supreme Court in *Fisher* expressly declined to decide "whether an attorney may claim the Fifth Amendment privilege of his client." *Id.* at 402 n. 8. Accordingly, we adhere to our previous decisions and reject appellant's Fifth Amendment argument.

Finally, appellant asserts that he was denied due process by the district court's refusal to grant him access to the sealed affidavit filed by the government in support of its motion to compel. The government had initially submitted the affidavit to establish that Gordon's legal services had been retained in furtherance of ongoing criminal activity thereby precluding use of the attorney-client privilege to shield disclosure of communications. The lower court rejected this argument and the government has not pressed it on appeal.

The district court reviewed the affidavit *in camera* and, finding that it consisted primarily of evidence generated by the grand jury, including the testimony of other witnesses, denied Gordon and Doe access to the affidavit. The Seventh Circuit addressed this precise issue in *In re Special September 1978 Grand Jury* 640 F.2d 49 (7th Cir. 1980). In that case the government also submitted material under seal to establish that fraud vitiated the attorney-client privilege claimed by the recipients of a grand jury subpoena *duces tecum*. The trial court reviewed the documents *in camera* and, on appeal, the subpoenaed parties asserted that their rights to due process had been violated. The Seventh Circuit rejected the contention:

The *in camera* submissions were themselves generated by the Grand Jury's investigation and were necessary to support its claim that the subpoenaed documents should be made available.

* * *

Those documents contain the words of grand jury witnesses, the disclosure of which could affect the continued cooperation of those witnesses and chill or distort the future testimony of others. In these circumstances, the judge's decision to view the documents *in camera* did not constitute a due process violation or an abuse of his discretion.

Id. at 57-58 (footnote omitted).

Similarly, in *In re John Doe Corp*, 675 F.2d 482, 490 (1982), the Second Circuit upheld the use of *in camera* submissions to resolve the government's claims that an attorney-client relationship was tainted by a criminal purpose:

We recognize that appellants cannot make factual arguments about materials they have not seen and to that degree they are hampered in presenting their case. The alternatives, however, are sacrificing the secrecy of the grand jury or leaving the issue unresolved at this critical juncture. We believe those alternatives less desirable than the *in camera* submission utilized by Judge Sifton. Appellant, after all, is itself asserting a right to confidentiality, and the government wanted to test the validity of that claim. Appellant's argument that the government may not do so without sacrificing its own valid claim to secrecy seems rather ironic in the circumstances. Leaving the issue unresolved, on the other hand, would permit wholly untested claims of privilege to obstruct investigations of federal crimes. There is a public interest in respecting confidentiality of communications by clients to their attorneys, in maintaining the secrecy of grand jury proceedings and in investigating and prosecuting federal crimes. Where these interests conflict or the validity of privilege claims based on these interests are challenged, the limitations on adversary argument caused by *in camera* submissions are clearly outweighed by the benefits of obtaining a judicial resolution of preliminary evidentiary issue while preserving confidentiality.

Accord, In Re Grand Jury Proceedings (Fine), 708 F.2d 1571, 1576 (11th Cir. 1983). This Court is persuaded that an *in camera* submission on the facts to this case was a reasonable accommodation of the need to maintain secrecy of the grand jury investigation and the need for prompt resolution of the privilege issue. Hence, this Court finds no abuse of discretion and no deprivation of appellant's right to due process.

Accordingly, the lower court's order compelling Gordon to respond to the enumerated grand jury inquiries is **AFFIRMED**.

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No. 83-1468

Office - Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD DURANT, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals correctly held that an attorney was not entitled by the attorney-client privilege to refuse to disclose to the grand jury the identity of his client who paid him with a check that had been drawn on a bank account into which stolen checks had been deposited.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 723 F.2d 447.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1983. The petition for a writ of certiorari was filed on March 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 1, 1983, Special FBI Agent Edwards visited the office of petitioner, an attorney, and ex-

plained that the FBI was investigating the theft of numerous checks made payable to International Business Machines, Inc. ("IBM"). Edwards stated that a number of the stolen checks had been traced and shown to have been deposited into various bank accounts under names of non-existent organizations, at least one of which included the initials "IBM." Edwards produced a photostatic copy of a check that had been drawn on one of these fictitious accounts and had been made payable to petitioner's law firm. Petitioner conceded that this check for \$15,000 had been received by his law firm for services rendered to a client in two cases, one of which was "finished" and the other of which was "open," and had been endorsed by the firm. However, petitioner refused to disclose the identity of the client to whose credit the proceeds had been applied, asserting the attorney-client privilege. Pet. App. 1a-2a.

On the following day, petitioner was subpoenaed to appear before a grand jury in the United States District Court for the Eastern District of Michigan. During that appearance, he again refused to identify the client on whose behalf payment was made by the check in question. The government immediately moved for an order requiring petitioner to provide the requested information. At a hearing that same afternoon, petitioner informed the court that his invocation of the privilege was justified because disclosure of the client's name would implicate the client in criminal activity. In addition, petitioner stated that he did "not know any of the facts about this theft or anything else" (Pet. App. 2a). The court held that the privilege was not applicable and ordered petitioner to identify the client. Upon his refusal to do so, petitioner was held in contempt. *Ibid.*

On March 9, 1983, a subpoena was issued directing petitioner to appear before the grand jury and produce a list of all the clients of his law firm. Petitioner moved to quash the subpoena based on the attorney-client privilege, once again asserting that production of the documents would implicate his client in criminal activity. Petitioner claimed that disclosure of his client's name would implicate the client in the very criminal activity about which the client had sought legal advice. Petitioner did not, however, seek to introduce evidence establishing that his client had indeed sought legal advice relating to the theft of the IBM checks (Pet. App. 3a-5a).

In response to petitioner's new assertion that his client had engaged petitioner's services specifically to defend against possible charges of theft in connection with the IBM checks, the government introduced the client's check into evidence. A notation on the lower left corner of the check stated "corporate legal services." The government also pointed out that the FBI had not initiated the investigation in this matter—or even been informed of the theft of the IBM checks—until approximately two weeks after the check had been received by petitioner. The district court withheld a decision on petitioner's motion to quash the subpoena pending appellate resolution of the contempt order arising out of petitioner's refusal to name the particular client whose identity the grand jury sought. Pet. App. 5a.

2. The court of appeals affirmed the judgment of contempt against petitioner (Pet. App. 1a-15a). The court of appeals stressed that the purpose of the attorney-client privilege is to protect confidential communications by the client to his lawyer on matters relating to the lawyer's representation of the client

and that the courts of appeals are "unanimously in accord with the general rule that the identity of a client is, with limited exceptions, not within the protective ambit of the attorney-client privilege" (Pet. App. 8a). The court then rejected petitioner's contention that the identity of the client who paid for services by means of the check in question nevertheless was privileged under two asserted "exceptions" to this general rule.

First, the court rejected petitioner's reliance upon an exception permitting assertion of the privilege upon the showing of a "strong possibility" that disclosure of the client's identity would implicate him in the very offenses in connection with which he sought legal advice (Pet. App. 9a-10a, 14a, 15a). Although the court agreed that disclosure would not be required in those circumstances (Pet. App. 10a), it found that petitioner had "clearly failed to satisfy his burden of demonstrating a 'strong possibility' that disclosure of the identity of his client would implicate that client in the very [matter] for which legal advice had been initially sought" (*id.* at 15a). The court noted in this regard that petitioner had failed to make an *ex parte*, in camera submission to substantiate his claim, but instead had rested on his "blanket assertion" that the client had initially sought legal advice on matters relating to the theft of the IBM checks (*id.* at 14a-15a). "Such unsupported assertions of privilege," the court explained, "are strongly disfavored" (*id.* at 15a). The court also noted that at the first hearing, on March 2, 1983, petitioner "had expressly disavowed knowledge of the existence of stolen IBM checks," which, the court explained, "significantly diminishes the credibility of [petitioner's] subsequent March 22 representation that his client had indeed

engaged [petitioner's] services for past activity relating to stolen [IBM] checks" (*ibid.*).

Second, the court of appeals rejected petitioner's argument for another exception permitting assertion of a privilege not to disclose the client's identity "when disclosure of the identity of the client * * * provide[s] the 'last link' of evidence [leading to the client's indictment]" (*id.* at 12a). The court reasoned that such an exception "is simply not grounded upon the preservation of confidential *communications* and hence not justifiable to support the attorney-client privilege" (*id.* at 13a (emphasis in original); see also *id.* at 14a).

ARGUMENT

The decision of the court of appeals rejecting the claim of privilege in the circumstances of this case is plainly correct. A lawyer has no less an obligation than a doctor, accountant, or any other member of the community to identify to the grand jury the person who paid for his services by a check drawn on an account containing stolen funds. Petitioner's efforts to conceal this information behind the cloak of the attorney-client privilege perverts the salutary purposes of that privilege, and the court of appeals' rejection of those efforts does not conflict with any decision of this Court or of any court of appeals. Review by this Court therefore is not warranted.

1. Under the attorney-client privilege, "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged." *Fisher v. United States*, 425 U.S. 391, 403 (1976). The purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests

in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). In short, the privilege protects confidential communications by the client to his lawyer.

In this case, however, petitioner was not asked to divulge the substance of confidential communications by the client who paid him by the check drawn on stolen funds. He was asked to divulge only his client's identity. And as petitioner concedes (Pet. 9), the "[f]ederal courts are unanimously of the opinion that the identity of a client is, with limited exceptions, not protected by the attorney-client privilege." The basis of this consensus is found in the nature of the privilege itself, which protects only confidential *communications*. As this Court recognized more than 150 years ago, the mere identification of a person as the client of a lawyer "is preliminary, in its own nature, and establishes only the existence of the relation of client and counsel, and, therefore, might not necessarily involve the disclosure of any communications arising from that relation after it was created." *Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280, 294-295 (1826). See also *In re Osterhoudt*, 722 F.2d 591, 593 (9th Cir. 1983). Only where identification of the client in turn *would* "necessarily involve the disclosure of any communications" made by the client is the lawyer privileged from making that identification.

The court of appeals in this case recognized that the privilege would apply in such circumstances, under what it termed the "'tantamount to a communication' exception" to the general rule that a client's

identity is not privileged—an exception the court described as applicable “‘where so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication.’” Pet. App. 11a (quoting *NLRB v. Harvey*, 349 F.2d 900, 905 (4th Cir. 1965)).¹ Although the court of appeals characterized the application of the privilege in such a case as an “exception” to a general rule that the client’s identity is not privileged, in fact the propriety of the attorney’s refusal to supply the information in such a case simply reflects the fundamental principle of the attorney-client privilege itself that information may be withheld where disclosure would reveal confidential communications. See *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d 489, 491-495 (7th Cir. 1984); *In re Osterhoudt*, 722 F.2d at 593-594. The identity of the client does not become privileged in its own right in such a case; the identity may be withheld only because it would in turn actually reveal a confidence.

In this case, however, petitioner did not contend in district court (see Pet. App. 15a) and does not contend here that the privilege applies because disclosure of the identity of his client would necessarily result in disclosure of that client’s confidences. Petitioner instead relies on what he contends should be two

¹ Thus, for example, if the grand jury had learned that an unidentified client of a particular lawyer had confessed to the lawyer that he had robbed a bank, the attorney-client privilege would protect the attorney from being required to reveal the identity of that client. Although the question would take the form of a request only for the identity of the client, if the attorney answered, the effect would be to disclose that a particular client made a particular confidential communication. The purposes of the attorney-client privilege would support its application in such a case.

other exceptions to the general rule that the identity of a client is not privileged. These contentions are without merit.

2. a. Petitioner first contends (Pet. 9, 15) that the identity of the client need not be disclosed when the person invoking the privilege is able to show a "strong possibility" that such disclosure would implicate the client in the very matter for which legal advice was sought in the first place. The court of appeals in this case in fact *agreed* with petitioner that it would be appropriate to recognize a distinct exception applicable in those circumstances (Pet. App. 14a-15a). We oppose the recognition of any such exception, because it (like the second exception upon which petitioner relies, discussed below) is not tied to the purpose of the attorney-client privilege of protecting confidential communications by the client. It is irrelevant for present purposes, however, whether such an exception would be proper; as the court of appeals held, the exception is inapplicable here in any event because petitioner did not show that the check was given to his firm as payment for legal advice pertaining to the client's possible criminal liability for the theft of the IBM checks. Petitioner therefore did not make the requisite showing that a "strong possibility" existed that disclosure of the information would implicate the client in the very matter for which legal advice had been sought in the first place (Pet. App. 14a).² The court of appeals'

² On the other hand, if the check drawn on stolen funds were paid to the law firm for services rendered in connection with the theft of the IBM checks, the circumstances would suggest an abuse of the attorney-client relationship by the client akin to that for which the "crime or fraud" exception to the attorney-client privilege applies. See *Clark v. United States*, 289 U.S. 1, 15 (1983).

resolution of this fact-bound issue against application of the first of the exceptions upon which petitioner relies was correct and does not warrant further review.³

b. Petitioner also contends (Pet. 10-13) that he was privileged from disclosing the identity of his client under a second exception, which he says should be applicable where such disclosure would supply the "last link" in a chain of incriminating evidence likely to lead to the client's indictment, even though no confidential communications would be revealed. The only difference between this asserted exception and the one just discussed is that, under petitioner's formulation, the criminal activity for which the disclosure of the client's identity would furnish the "last link" of in-

³ In finding that petitioner had not laid a proper foundation for assertion of this exception, the court of appeals noted that he had made only a "blanket assertion" that the client had sought advice in connection with the IBM checks, unsupported by any factual showing—by means of an *in camera* submission or otherwise—that this was the case (Pet. App. 15a). Such bare assertions of the privilege are strongly disfavored. See *United States v. Davis*, 636 F.2d 1028, 1044 n.20 (5th Cir. 1981); *In re Grand Jury Witness (Salas)*, 695 F.2d 359, 362 (9th Cir. 1982). The court further found the credibility of petitioner's bare assertion to be significantly undermined by his explicit disavowal of any knowledge of the IBM checks at the first hearing in this matter (Pet. App. 15a). We note as well that the check itself bore the notation "corporate legal services"—which does not suggest that the legal services in question concerned the client's personal criminal liability for the theft of the checks—and that the government informed the court that the FBI had not been notified of the theft of the IBM checks until approximately two weeks *after* petitioner had received the check (Pet. App. 5a), thereby making it all the more unlikely that the client initially sought his advice in connection with his possible liability for theft of the IBM checks.

criminating evidence apparently need not even have been related to the matters on which the client sought the lawyer's legal advice. Indeed, that necessarily is the basis of petitioner's argument here, in light of the court of appeals' holding that petitioner had failed to show that the client had sought his advice in connection with the theft of the IBM checks. Nothing in the nature or purposes of the attorney-client privilege supports a lawyer's refusal to identify the person implicated in the commission of a crime that is unrelated to the matters on which that person sought his legal advice. Cf. *Hoffa v. United States*, 385 U.S. 293, 307-309 (1966).

As the court of appeals explained, moreover, the fundamental defect in this asserted exception is that it "is simply not grounded upon the preservation of confidential *communications* and hence not justifiable to support the attorney-client privilege." Pet. App. 13a (emphasis in original). Instead, it appears to rest on notions derived from the Fifth Amendment privilege against compelled self-incrimination (*ibid*). This Court's decision in *Fisher* makes clear, however, that the Fifth Amendment affords petitioner no privilege to withhold the identity of his client simply because that information may prove to be incriminating, since there would be no compelled disclosure by the *client* involved. 425 U.S. at 396-401. Application of the attorney-client privilege, in contrast to the Fifth Amendment privilege, depends not on whether the lawyer is asked to furnish information that may incriminate his client, but rather on whether the lawyer is asked to reveal a confidential communication by his client (whether or not it is incriminating). Here, as is not disputed, no such communication would be revealed.

Petitioner therefore urges a significant extension of the privilege, based on a radical departure from the purposes it was intended to serve. This attempt is contrary to the Court's admonition that the privilege is not to be given an expansive scope: "[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege." *Fisher v. United States*, 425 U.S. at 403; accord, *Weatherford v. Bursey*, 429 U.S. 545, 555 n.4 (1977). See also *United States v. Nixon*, 418 U.S. 683, 709-710 (1974). Other courts of appeals, like the court below in the instant case, also have rejected the contention that the attorney-client privilege permits a lawyer to refuse to divulge the identity of a client simply because that information might incriminate the client, focusing instead, as *Fisher* requires, on whether confidential communications would be disclosed. *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d at 491-495; *In re Osterhoudt*, *supra*, 722 F.2d at 593-594; *In re Grand Jury Empanelled Feb. 14, 1978 (Markowitz)*, 603 F.2d 469, 473 & n.4 (3d Cir. 1979); *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963).

In addition, important policy considerations weigh against extension of the attorney-client privilege beyond the protection of confidential communications to permit the concealment of the mere identity of the client as well—especially in light of the compelling public interest in uncovering evidence about the commission of a crime. See *United States v. Nixon*, 418 U.S. at 709-710. For example, when a matter is in

litigation, there is a widely shared view that a party is entitled to know the identity of his opponent and to know the authority of counsel representing an opposing interest. See 8 Wigmore, *Evidence* § 2313 (McNaughton rev. ed. 1961); McCormick, *Evidence* § 90, at 186 (1972). The public, too, has such a right. And as McCormick explains (§ 90, at 186-187), there is no reason why this principle should be limited to litigation, especially when the attorney's actions—here, the receipt and endorsement of a check drawn on an account containing stolen funds—may affect the rights of third parties. The practice of law is a public profession, regulated by licensing authorities, the bar, and the courts to assure the highest standards of professional integrity and public confidence in that integrity. The established rule that the identity of a person who a lawyer represents in a matter is not cloaked in secrecy furthers these interests, and there is no indication that this rule has significantly deterred individuals from consulting or confiding in a lawyer.

In contrast, to permit a lawyer to withhold such information even from a grand jury investigating the commission of a crime simply because that information might incriminate the client, as petitioner urges, could have a deleterious effect on the confidence of the public in the legal profession because it would transform the attorney-client privilege into an unwarranted shield protecting wrongdoers from the consequences of their acts. Indeed, as McCormick has observed (§ 90, at 187), "[o]ne who reviews the cases in this area will be struck with the prevailing flavor of chicanery and sharp practice pervading most of the attempts to suppress the proof of professional employment, and the broader solution of a general rule

of disclosure seems the one most consonant with the preservation of the high repute of the lawyer's calling." Accord, 2 Weinstein, *Weinstein's Evidence* ¶ 503(a)(4) [02], at 503-35 to 503-36 (1982). These concerns are not unwarranted even in this case. We need not question the sincerity of petitioner's invocation of the attorney-client privilege here to note the potential for public cynicism about the legal profession and the administration of justice that could result from a rule that would permit a lawyer—unlike a doctor, accountant, or anyone else in the community—to refuse to tell the grand jury who paid him by a check drawn on an account into which stolen checks had been deposited.

3. Petitioner contends (Pet. 10-13), however, that other courts of appeals have recognized an exception permitting a lawyer to withhold the identity of the client if disclosure would supply the "last link" of evidence incriminating the client, even if confidential communications would not be revealed, and he urges the Court to grant certiorari to resolve that conflict. Contrary to petitioner's contention, however, there is no such conflict warranting this Court's attention. Although some confusion has been engendered by ambiguous dicta in several opinions, recent appellate decisions indicate that the situation will be clarified by the lower courts.

a. As petitioner concedes (Pet. 9), the "last link" exception he urges has been traced to the Ninth Circuit's decision in *Baird v. Koerner*, 279 F.2d 623 (1960), in which the court held that the attorney-client privilege permitted a lawyer to decline to disclose the identity of the clients on whose behalf he made anonymous payments to the Treasury of sums due for the clients' back taxes. The Ninth Circuit's

upholding of the invocation of the attorney-client privilege in *Baird v. Koerner* itself has been rightly criticized.⁴ But even if *Baird v. Koerner* were correctly decided, it does not support petitioner's position here. Although the Ninth Circuit in *Baird* pointed out that disclosure of the client's identity might be the "link" that could form the chain of evidence necessary to convict the client, the court appears to have rested its holding on the fact that disclosure of the client's identity would have revealed confidential communications—in the form of an acknowledgment

⁴ See McCormick, § 90, at 187 n.68 ("it may well be questioned whether the attorney was not in fact merely purveying anonymity, scarcely a professional legal service"); *Weinstein's Evidence* ¶ 503(a) (4) [2], at 503-34 to 503-35 ("It is questionable whether the attorney-client privilege which rests on the assumption that free consultation enhances the administration of justice should be enforced when non-disclosure interferes so strongly with the administration of justice. Here the attorney-client privilege is being used to gain a positive advantage for wrong-doers."). See also U.S. Br. in Opp. 13-14, *John Doe v. United States*, petition for cert. pending, No. 83-1309.

These criticisms seem to us rightly to reveal the fallacy of treating the result in *Baird* as an apt invocation of the attorney-client privilege. It is possible, of course, that the result in *Baird* nevertheless could be explained or defended on other grounds. The Ninth Circuit's holding may at bottom reflect the judgment that a somewhat different privilege from the one invoked—which could be called the privilege of anonymous restitution—is in the public interest. Such a privilege could reasonably be rooted in the conclusion that anonymous restitution is better than no restitution, which is what might have resulted in the future if *Baird* had reached an opposite outcome. Needless to say, this case involves no comparable independent public good to be served by maintaining the client's anonymity.

by the client that he was guilty of a criminal offense (or at least that he owed taxes) and, as a consequence, the client's motive for seeking legal advice (a matter which itself was regarded as privileged). See 279 F.2d at 629-631, 632, 633. In fact the Ninth Circuit recently made clear that this indeed was the basis of its decision in *Baird*, explaining that "[t]he principle of *Baird* was not that the privilege applied because the identity of the client was incriminating, but because in the circumstances of the case disclosure of the identity of the client was in substance a disclosure of the confidential communication in the professional relationship between the client and the attorney." *In re Osterhoudt*, 722 F.2d at 593.⁵ Accordingly, there is no merit to petitioner's claim (Pet. 9-10) that the Sixth Circuit's decision in this case rejecting the "last link" exception because it is not grounded in protection of confidential communications conflicts with the Ninth Circuit rule in *Baird*.⁶

b. Petitioner also asserts a conflict with decisions of the Fifth Circuit. See Pet. 7, 10. The first of the Fifth Circuit cases upon which he apparently relies (see Pet. 10) is *In re Grand Jury Proceedings*

⁵ See also 8 Wigmore, *supra*, § 2313, at p. 610 n.1 (the privilege was upheld in *Baird* "because disclosure of identity would lead ultimately to disclosure of taxpayer's motive for seeking legal advice").

⁶ Similarly, the Seventh Circuit, which followed *Baird* on essentially identical facts in *Tillotson v. Boughner*, 350 F.2d 663, 665-666 (7th Cir. 1965), also recently clarified that the result in *Tillotson* and other cases, including *Baird*, was dependent upon the fact that disclosure of the client's identity would have disclosed confidential communications. *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d at 492-494.

(*Jones*), 517 F.2d 666 (1975). There, the court held that attorneys could not be required to identify the unnamed third parties who were also the attorneys' clients and who paid legal fees or posted bond for certain named clients. Although the court's reasoning is somewhat unclear and the opinion does mention that the disclosures might incriminate the unnamed third-party clients in tax matters, a close reading of the opinion indicates that it (like *Baird v. Koerner*, upon which it relied (517 F.2d at 672)) rested at least in part on the conclusion that disclosure of the identities of the unnamed third-party clients would have revealed confidential communications they made to the attorneys. See *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d at 493.⁷ But to the extent that the decision in *Jones* may have been based on the mere fact that disclosure might incriminate the client, rather than protection of confidential communications, it is significant that *Jones* preceded this Court's decision in *Fisher*, which rejects the incriminatory nature of

⁷ See 517 F.2d at 669 (explaining that the attorneys claimed the privilege because their answers "would disclose communications made to them in confidence"); *id.* at 672-673 (the attorneys were called "for the purpose of incriminating their undisclosed clients as to privileged communications"); *id.* at 674 ("Just as the client's verbal communications are protected, it follows that other information, not normally privileged, should also be protected when so much of the substance of the communications is already in the government's possession that additional disclosures would yield substantially probative links in an existing chain of inculpatory events or transactions"); *id.* at 674-675 ("The attorney-client privilege protects the motive itself from compelled disclosure, and the exception to the general rule protects the client's identities when such protection is necessary in order to preserve the privileged motive.").

the information as a basis for the lawyer to resist disclosure. 425 U.S. at 396-401.*

Petitioner also apparently relies (Pet. 7, 10) on the Fifth Circuit's subsequent decision in *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026 (1982) (en banc). However, in *Pavlick* the court held that the attorney was *not* privileged to withhold the identity of his client who furnished funds to pay the attorney and post bond for three other of the attorney's clients who were arrested in a narcotics smuggling scheme. Judge Gee's opinion, which does not appear to speak for a majority of the en banc court (see note 9, *infra*), acknowledged the Fifth Circuit's prior holding in *Jones* but distinguished it, principally on the ground that the "crime or fraud" exception to the attorney-client privilege applied because the third party's agreement to provide legal services in the event the three other clients were apprehended was in furtherance of the original conspiracy. 680 F.2d at 1028-1029. Judge Gee also

* The result in *Jones* seems quite unwarranted in any event. The fortuity that the attorney for the targets also was the attorney for the third parties who paid the fees and posted bond for the targets (and therefore was in a position to receive confidential communications from the third parties regarding their own legal matters) should not be an occasion for extending a shroud of secrecy over the third parties' payment of the fees and bonds for the targets—information that otherwise would clearly not be privileged. If the third parties had paid these sums directly to the targets, there could be no claim of privilege, even if the fact that they did so would be incriminating. The mere fact that the sums instead were paid to the attorney to be expended on the targets' behalf should not trigger application of the privilege. Cf. *Wood v. Georgia*, 450 U.S. 261 (1981). See *In re Grand Jury Proceedings (Freeman)*, 708 F.2d 1571, 1575-1576 (11th Cir. 1983).

characterized *Jones* as recognizing a "limited and narrow exception" to the general rule that "obtains when the disclosure of the client's identity by his attorney would have supplied the last link in an existing chain of incriminating evidence likely to lead to the client's indictment." 680 F.2d at 1027. It is this language upon which petitioner relies in urging that the attorney-client privilege applies here. Yet in *Pavlick* the Fifth Circuit did not explicitly disavow the repeated statements in *Jones* that application of the privilege depended on the fact that confidential communications would be disclosed. In light of this Court's intervening decision in *Fisher*, it would be reasonable to expect at least some discussion of that issue if the court intended wholly to divorce the attorney-client privilege from its traditional purpose of protecting confidential communications. And in fact the separate opinions in *Pavlick* indicate that this was not the court's intent.*

* Judges Rubin, Clark and Randall concurred only in the result. 680 F.2d at 1029. They observed, *inter alia*, (i) that attorney Pavlick had failed to present evidence that any communications between him and the third-party client concerning payment of the fee for the three indicted clients were for the purpose of obtaining legal advice for the third party, and (ii) that "the attorney-client privilege shields only those communications made for the purpose of securing such advice" (*ibid.*; see also *id.* at 1030 & n.2). Similarly, Judge Garwood stressed in his concurring opinion that "there is no showing that requiring Pavlick to answer the question posed will disclose any communication between Pavlick and [the third-party client] for the purpose of obtaining legal advice from Pavlick" (680 F.2d at 1031). In his dissent, Judge Politz, joined by Judges Tate and Williams, explicitly reiterated the language in *Jones* itself that the identity of the client should be protected "when so much of the substance of the communications is already in the government's possession that additional dis-

Moreover, the court in *Pavlick* also distinguished *Jones* and held the privilege inapplicable because it did not present the "peculiar facts" in *Jones*—including what the court viewed as the fishing expedition nature of the inquiry in *Jones* that involved the clients of "a generous portion of the criminal law bar of the lower Rio Grande Valley area" (680 F.2d at 1027). Similarly here, there can be no suggestion that the grand jury was engaged in a fishing expedition, since the specific check in question had been traced directly to petitioner's firm by other means. Against this background, the dictum in *Pavlick* upon which petitioner relies—in an opinion that actually *rejects* the claim of privilege—does not present a conflict with the Sixth Circuit's decision in this case, which likewise rejects the assertion of the attorney-client privilege.

c. Finally, petitioner erroneously asserts (Pet. 7) that the decision below conflicts with the Eleventh Circuit's decision on application for a stay in *In re Grand Jury Proceedings (Twist)*, 689 F.2d 1351 (11th Cir. 1982). The Eleventh Circuit in *Twist*, like the Fifth Circuit in *Pavlick* and the court below, actually *rejected* the claim of privilege (689 F.2d at 1352-1353). Moreover, *Twist* cited *Jones* for the proposition that "[t]he attorney-client privilege is limited to confidential communications between the lawyer and the client made for the purpose of securing legal advice" (*id.* at 1352). Although the court in *Twist* also cited *Jones* for the proposition

closures would yield substantially probative links in an existing chain of inculpatory events or transactions' " (*id.* at 1033, quoting 517 F.2d at 674). Thus, seven of the twelve judges participating in the decision in *Pavlick* explicitly discussed the matter of confidential communications.

that there is an exception to the general rule that the client's identity is not privileged where disclosure "would supply the last link in an existing chain of incriminating evidence likely to lead to the client's indictment" (*id.* at 1352-1353), in light of the other passages in the court's opinion, this language cannot be read as a holding that the potential for disclosure of confidential communications was not relevant.¹⁰ That the Eleventh Circuit did not intend such a holding in *Twist* is made even clearer by its subsequent decision in *In re Slaughter*, 694 F.2d 1258 (1982). There the court (citing *Pavlick* and *Baird*) stated that fee information is privileged from disclosure only "where more than simple fee information will necessarily come to light by compliance with the order, thereby uncovering privileged information," and held that the case before it did not fall within that exception because "[n]o confidences will be disclosed by compliance with the order to give attorney's fee information." 694 F.2d at 1260.

d. Thus, contrary to petitioner's contention, there is no conflict among the circuits on the question whether the attorney-client privilege protects the identity of the client even where confidential communications would not be disclosed. The Seventh and Ninth Circuits have explicitly rejected such a rule, the Eleventh Circuit never adopted one, and although the dictum in *Pavlick* is ambiguous, it does not repudiate the language in *Jones* that appears to require a nexus to confidential communications. In any

¹⁰ The Eleventh Circuit in *Twist* also stated that it approved the reasoning of the Fifth Circuit in *Pavlick*, but that statement was made only in connection with the court's discussion of the distinct issue of the "crime or fraud" exception to the attorney-client privilege. 689 F.2d at 1362.

event, as the Seventh Circuit recently concluded after its thorough review of the cases, although there is language in some opinions referring to whether disclosure of a client's identity or fees would incriminate the client, "in most of the cases [in our view, all of the cases], the courts were prepared to *apply* the privilege only where the disclosure of the client's identity or fees would in fact have revealed the substance of what were indubitably confidential communications." *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d at 492-493 (emphasis added). See generally *id.* at 492-495. For this reason, whatever the precise reasoning or language employed, there is no indication of any conflict in the circuits with respect to the *result* that the courts of appeals have reached in these cases. Review by this Court therefore is unwarranted, especially now that the recent decisions of the Seventh and Ninth Circuits have brought some clarity to the area.

What is more, even if the Court were otherwise disposed to grant review in a case to decide whether the attorney-client privilege might in some circumstances permit a lawyer to refrain from disclosing the identity of a client or information pertaining to the payment of fees, this case would be a most unlikely candidate for recognition of such an extension of the privilege. To permit a lawyer to suppress the identity of the person who paid for services by means of a check drawn on stolen funds, even though disclosure would not threaten the sanctity of the attorney-client relationship with that person on other matters, would convert the attorney-client privilege from a protection against government intrusion or oppression into an instrument to avoid the consequences that ordinarily would befall a person who

passed a check drawn on stolen funds. Even the Fifth Circuit, on whose cases petitioner principally relies in asserting that there is a circuit conflict requiring resolution by this Court, has recognized that "[i]f a legitimate legal relationship is an evidentiary lead to subsequent, unrelated criminal activity, no substantial interest of society is served by protecting the name of the client and fee arrangement involved in the legitimate activity." *In re Grand Jury Proceedings (Fine)*, 641 F.2d 199, 204 n.5 (1981). Moreover, a claim of privilege has been rejected in other cases in which payment of attorney's fees was linked to the proceeds of the crime itself or was direct evidence of the amount of income the client received in connection with an illegal enterprise. See, e.g., *Genson v. United States*, 534 F.2d 719, 727-729 (7th Cir. 1976); *United States v. Jeffers*, 532 F.2d 1101, 1114-1115 (7th Cir. 1976), vacated in part on other grounds, 432 U.S. 137 (1977). There is no reason for a different result here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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